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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE RICHARD AND SHEILA J. McKNIGHT 2000 FAMILY TRUST, Richard McKnight, Trustee Plaintiff v. WILLIAM J. BARKETT, an individual, CASTAIC III PARTNERS, LLC a California limited liability company Defendants AND RELATED INTERVENOR ACTIONS, THIRD PARTY ACTIONS AND COUNTERCLAIMS	Case No. 2:10-cv-01617-RCJ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CERTIFY JUDGMENT AS FINAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 54(b)

I. INTRODUCTION AND STATEMENT OF THE CASE

This is a motion by Third Party Defendants and Counterclaimants and Fourth Party Plaintiffs Debt Acquisition Company of America V, LLC and DACA-Castaic, LLC(“DACA”), asking this Court to certify as final for purposes of appeal the Judgment entered January 29, 2015 as ECF No. 355 (the “DACA Judgment”). The DACA Judgment disposes of all claims by and against DACA in this action. It grants declaratory relief only as to a series of issues relating to DACA’s enforcement of a two trust deeds which have been foreclosed.

This case was originally a lawsuit on a promissory note (executed by Castaic Partners III, LLC) and on a related guaranty executed by William J. Barkett. The case was commenced on behalf of one plaintiff (the Richard and Sheila J. McKnight Family Trust). A large number of Direct Lenders later sought and obtained leave to file a complaint in intervention naming Mr. Barkett, as guarantor, and all of the borrowers (Castaic Partners, LLC, Castaic Partners II, LLC and Castaic Partners III, LLC) (collectively the “Barkett Parties”) as defendants. The Direct Lenders’ complaint in intervention sought, among other things, a money judgment against Mr. Barkett on the Guaranties.

DACA was impleaded into the case when the Barkett Parties named DACA as a third party defendant. DACA counterclaimed against the Barkett Parties. DACA was later granted leave to file a supplemental counterclaim and a fourth party complaint naming certain additional Barkett affiliates as fourth party defendants. Pursuant to Court order, DACA filed a consolidated pleading on March 25, 2013 as ECF No. 231. DACA’s pleadings seek only declaratory relief.

After granting DACA's motion for summary judgment by Order entered January 5, 2015 (ECF No. 352), this Court entered the DACA Judgment on January 29, 2015 (ECF No. 355).

The Direct Lenders' complaint in intervention has not yet been litigated. In minutes filed on April 29, 2015 (ECF No 365) the Court scheduled a further status conference to take place on July 24, and made reference to the preparation of a "Proposed Discovery Plan / Scheduling Order." No motion for summary judgment has been filed on either side.

The DACA Judgment determines that DACA has completed valid foreclosures of two of the three trust deeds involved in this case, which secured what are referred to as the Tapia Ranch Note and Castaic II Note. DACA has elected not to proceed with the foreclosure of the Castaic III Trust Deed.

The Purchase Agreement referred to in the DACA Judgment, under which DACA became the assignee of record of the Castaic Notes and Trust Deeds, excluded by its terms the Guaranties. All claims under the Guaranties were intended to remain with the Direct Lenders. In accordance with this intent, DACA did not sue on the Guaranties. The claims for relief raised in DACA's pleadings were only for declaratory relief, to facilitate the foreclosure of the trust deeds. The Direct Lenders did sue on the Guaranties via their complaint in intervention.

Notwithstanding DACA's position that the provisions of the Purchase Agreement relating to the Guaranties are valid, paragraph 1.19 of the Judgment incorporates this Court's ruling to the contrary, stating:

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> The assignment of the Castaic Notes and Trust Deeds necessarily included, by operation of law, and assignment of rights under any guarantees of the obligations under those Notes. Accordingly, DACA is the real party in interest with respect to any claims based on those guarantees.

To the extent that, pursuant to the DACA Judgment, DACA is the real party in interest as to the Guaranty claims currently being prosecuted on behalf of the Direct Lenders, DACA has ratified the continued prosecution of those claims in the name of the Direct Lenders pursuant to Federal Rule of Civil Procedure 17(a)(3).

II. THE DACA JUDGMENT MAY NOT BE APPEALED UNLESS CERTIFIED AS FINAL UNDER FRCP 54(b)

Federal Rule of Civil Procedure 54(b) provides as follows:

> (b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Although the DACA Judgment has now been entered, the Direct Lenders' complaint in intervention (ECF No. 61) and the Barkett Parties' counterclaim (ECF No. 156) are still in the discovery stage. In the absence of certification, the DACA Judgment remains in legal limbo and will not have the effect of finally putting to rest the Barkett Parties' claims respecting the foreclosure.

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It is not enough for the district court to enter a judgment which disposes of all claims by and against a particular party to an action. The court must also make the "requisite express determination that there is no just reason for delay." *Nat'l Ass'n of Home Builders v. Norton,* 325 F.3d 1165, 1167 (9th Cir. 2003); *Frank Briscoe Co. v. Morrison–Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir.1985).

The finding should not merely recite the "no just reason" language contained in the rule, but also include a "brief, reasoned explanation." *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 629-30 (2d Cir. 1991); *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 166 (11th Cir. 1997). See, *Morrison-Knudsen Co. v. Archer,* 655 F.2d 962 (9th Cir. 1981). However, in the Ninth Circuit, the absence of more detailed findings "is not a jurisdictional defect." *Alcan Aluminum Corp. v. Carlsberg Fin. Corp.*, 689 F.2d 815, 817 (9th Cir. 1982). Also, the requirement of more detailed findings has been held not to apply where (as is the case here) "[t]he posture of the case is readily obtainable from the briefs and record." *W.L. Gore & Associates, Inc. v. Int'l Med. Prosthetics Research Associates, Inc.*, 975 F.2d 858, 865 (Fed. Cir. 1992); quoting *Alcan Aluminum Corp, supra*, 689 F.2d at 817.

III. CERTIFICATION UNDER RULE 54(b) IS WITHIN THE COURT'S DISCRETION

The Ninth Circuit has said that "[w]hether or not to certify a Judgment as final under Rule 54(b) is a matter "exclusively within the Court's discretion." *Illinois Tool Works, Inc. v. Brunsing*, 378 F.2d 234, 236 (9th Cir. 1967); *Metal Coating Corp. v. Nat'l Steel Const. Co.*, 350 F.2d 521, 522-23 (9th Cir. 1965). "In determining whether to certify a judgment under Rule 54(b) 'the discretionary judgment of the District

Court should be given substantial deference.'" *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10, 100 S.Ct. 1460, 1466, 64 L.Ed.2d 1 (1980)"

Deference is granted to the district court's decision because it is "'the one most likely to be familiar with the case and with any justifiable reasons for delay.' " *Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 468* (9th Cir.1987) (quoting *Curtiss–Wright Corp. v. General Elec.*, supra., 446 U.S. 1, 10). "The present trend is toward greater deference to a district court's decision to certify under Rule 54(b)." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991).

IV. THE DACA JUDGMENT SHOULD BE CERTIFIED AS FINAL BECAUSE THERE IS NO JUST REASON FOR DELAY

As stated in the DACA Judgment, after completion of the foreclosures "DACA-Castaic, LLC "retains a fiduciary duty to the Direct Lenders to perform the obligations of DACA-Castaic, LLC under the Purchase Agreement and ultimately to distribute the proceeds of the loans to the Direct Lenders under the terms provided for in the Purchase Agreement." (DACA Judgment ¶ 1.18 p. 5) In order to move forward with any development or sale, the validity of DACA's foreclosures must be finally adjudicated. Delay in achieving that result is prejudicial to the Direct Lenders. Yet the case between the Direct Lenders and the Barkett Parties is unlikely to be resolved for perhaps another year.

In effect, the DACA Judgment consists of nothing other than declaratory relief as to the validity of the foreclosures. The mutual claims between the Direct Lenders and the Barkett Parties do not affect the validity of the foreclosures. Essentially, the Barkett Parties claim that the Direct Lenders are vicariously liable for the misdeeds of USA Commercial and its successor Compass in their role as loan servicer. These events are all alleged to have occurred long before DACA became the beneficiary or record under the Castaic Trust Deeds. This Court has already ruled that the express waiver of setoff rights contained in the Castaic Notes is enforceable under Nevada law. (Order ent. 3/14/12 as ECF No. 170, p. 9 ll. 15-18) For that reason, *even a money judgment in favor of the Barkett Parties and against the Direct Lenders would not affect the balance of the notes or the validity of foreclosure notices based on those balances.*

To certify a judgment under Rule 54(b) "it is not required that the Rule 54(b) claims be separate from and independent of the other claims." *Alcan Aluminum Corp. v. Carlsberg Fin. Corp.*, 689 F.2d 815, 817 (9th Cir. 1982). As in this case, the summary judgment in *Alcan Aluminum* completely disposed of all claims by and against a single party, Carlsberg. The Ninth Circuit concluded in that case that certification could actually facilitate either the settlement or the decision of the remaining claims, and therefore certified that judgment.

V. CONCLUSION

The DACA Judgment completely disposes of all claims by and against DACA. The relief granted in favor of DACA does not include a money judgment, only declaratory relief which is necessary to establish the validity of the foreclosures conducted by DACA. Even if the Direct Lenders were now to lose in their litigation against the Barkett Parties, this could not affect the validity of the foreclosures as determined in the DACA Judgment. Further delay in disposing of the Barkett Parties's claims concerning the foreclosure are prejudicial to the Direct Lenders, who are not expected to oppose the motion. For all of these reasons, this motion to certify the DACA Judgment under Rule 54(b) should be granted.

DATE: July 13, 2015 KIRBY & McGUINN, A P.C.

By: /s/ Dean T. Kirby, Jr.
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